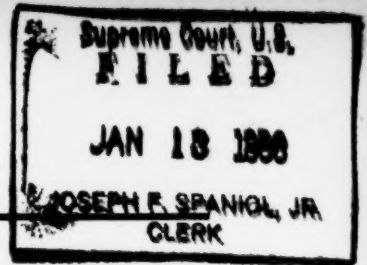


87-1187

No. 87-



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,

Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED
STATES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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January 13, 1988

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QUESTIONS PRESENTED

1. Did the court of appeals properly employ issue preclusion and avoidance doctrine to again deny the plaintiff federal judge an adjudication of the merits of his claim that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act") is unconstitutional?

2. Does the assignment of powers to the judiciary and the specification of procedures for their exercise against the individual federal judges made by the Act conflict with the allocation of powers and the specification of procedures established by the Constitution?

3. Did the court of appeals err in ruling that the Act's requirement that the Judicial Conference certify determinations to the House of Representative did not implicate separation-of-powers principle or undermine the exclusivity of the assign-

ment of the impeachment power?

(a) Did Congress only confer an option that did not implicate constitutional principle when it mandated that the Conference "shall . . . certify and transmit the determination and record of proceedings" for review by the House in any case in which "the . . . Conference concurs in the determination of the council" that a federal judge "has engaged in conduct . . . which might constitute one or more grounds for impeachment" based upon an investigation conducted pursuant to the Act?

(b) Is a determination certified to the House by the Judicial Conference based upon and accompanied by a record compiled through the exercise of the investigatory and subpoena powers granted by the Act so like a recommendation submitted by any other individual or group that any difference in its effect on

Congress is without constitutional significance?

4. Did the court of appeals properly avoid adjudicating specific claims that the Act conflicts with the guarantees established by the Compensation and Due Process Clause of the Constitution, claims which it acknowledged had not been addressed or resolved in the four years of litigation that preceded its decision?

PARTIES IN THE COURT OF APPEALS

The appellant in the court below and the petitioner here is the Honorable Alcee L. Hastings, a United States district judge in active service on the United States District Court for the Southern District of Florida. The appellees below and respondents here are the Judicial Conference of the United States (the "Judicial Conference"); Chief Justice of the United States, originally the Honor-

able Warren E. Burger and presently the Honorable William F. Rehnquist; the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders; the Judicial Council of the Eleventh Circuit (the "Council"); the Honorable John C. Godbold, former Chief Judge of the Eleventh Circuit; the Honorable Gerald Bard Tjoflat and the Honorable Frank M. Johnson, Jr., circuit judges in active service on the United States Court of Appeals for the Eleventh Circuit; the Honorable Sam C. Pointer (N.D. Ala.) and the Honorable William C. O'Kelley (N.D. Ga.), district judges in active service on district courts within the Eleventh Circuit; and the United States of America, as intervener.

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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1987

THE HONORABLE ALCEE L. HASTINGS,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

THE JUDICIAL CONFERENCE OF THE UNITED
STATES, et al.,
Respondents.

PETITION

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment that court entered against him.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Hastings v. Judicial Conference of the United States*, 829 F.2d 91

(D.C. Cir. 1987), and is set out in the appendix to this petition at 1-77. Judge Buckley filed a partial dissent that is set out at 178-85. The district court filed a memorandum opinion with its final order that is reported under the same name at 657 F. Supp. 672 (D.D.C. 1986) both are set out in the appendix at 86-97.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on September 15, 1987 (A. 98-99). On December 15, 1986, the court extended the time within which this petition might be filed until January 13, 1988 (Brennen, J.). The present petition was filed on that date and within the period specified by 28 U.S.C. § 2101(c) (1982) as extended. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case concerns the constitution-

ality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified as amended at* 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 and Supp. 1984). The provisions of the Act are set out in the appendix at 106-32. Resolution of the constitutional questions presented would involve the following provisions of the Constitution of the United States: U.S. const., art. I, § 1 (legislative powers), § 2, cl. 5 (power of impeachment), § 3, cls. 6 and 7 (trial and judgments on impeachment), § 8, cl. 9 (inferior courts) and cl. 18 (necessary and proper); art. II, § 1, cl. 1 (executive power), § 2, cl. 2 (appointments), § 4 (impeachments); art. III, § 1 (tenure and compensation), § 2 (judicial power); amends. I (free speech and redress of grievances); V (due process). Those provisions are set out in

the appendix at 100-05.

STATEMENT OF THE CASE

The material facts and reasons why the Court should grant the petition can be stated in a paragraph. The Act assigned unprecedented power and broad discretion to specified judicial agencies and officers to enable them to effectively regulate, investigate, and sanction the conduct of every federal judge. All who have studied the matter over the years have recognized that any system like that established by the Act would raise substantial constitutional questions,¹

¹ See, e.g., Kaufman, *The Essence of Judicial Independence*, 80 Colum. L. Rev. 671 (1980), and *Chilling Judicial Independence*, 88 Yale L.J. 681 (1979) (circuit judge); Ervin, *Separation of Powers: Judicial Independence*, 35 Law & Contemp. Probs. 108 (1970) (former United States Senator); Holloman, *The Judicial Reform Act: History, Analysis, and Comment*, id. at 128 (former Chief Counsel, Senate Judiciary Committee); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665 (1969) (professor of law); and Ziskind, *Judicial Tenure in the American*

questions that only the Court could resolve. The Act has been fully implemented and applied over the past six years. The petitioner is a federal judge against whom the Act has been extensively applied. For more than four years, he has pursued his claims that the Act was unconstitutional in order to present the issues to the Court in a proper record. The present case has joined all necessary and proper parties and has developed a

Constitution: English and American Precedents, 1969 Sup. Ct. Rev. 135 (historian); *Note, Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 Yale L.J. 1117 (1985). *Contra*, R. Berger, "Exclusivity of Impeachment and Judicial 'Good Behavior' Tenure," *Impeachment: The Constitutional Problems*, 122-80 (1973) (historian). See also, e.g., *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 537 (1968); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871); *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 74-89 (1970) (majority, 89-129 (Harlan, J., concurring in result), 129-41 (Douglas J., dissenting), 141-43 (Black, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

record that establishes a proper adjudicatory context within which the constitutional issues may be fully explored and finally resolved. The present petition brings that record before the Court. The Court should grant review in the case to resolve those issues so that all judges and officials in other branches may understand the rights and obligations that are incident to the office of United States judge.

In other cases, that paragraph might suffice. The present case involves Judge Hastings, however, and brings with it a six-year history that suggests the case and the reasons why review should be granted should be developed in somewhat greater detail. The necessary development is set out below.

The Nature of the Action

This action again challenges the constitutionality of the Act and of the man-

ner in which it has been implemented and applied. The Act assigns the Judicial Conference, the Chief Justice, and the judicial council and chief judge of each circuit power to investigate and sanction any United States judge whose conduct does not satisfy the norms they prescribe. The Act also requires that if a circuit council determines that a federal judge "has engaged in conduct . . . which might constitute . . . grounds for impeachment" and if the Judicial Conference "concurs in the determination," then the Conference must certify to the House of Representative (the "House") that "consideration of impeachment may be warranted" and transmit the record compiled under the Act to the House for whatever action it considers necessary. 28 U.S.C. § 372(c)(7)(B), (8). The Act has been fully implemented, and these agencies and officers have exercised their assigned powers. The present action

was brought by a United States district judge against whom those judicial agencies and officers who have exercised and are exercising the assigned powers.

The Material Facts

In 1979, President Carter appointed Alcee L. Hastings a United States district judge to serve on the district court in Miami, Florida. In 1981, the Justice Department initiated an investigation that culminated when a Miami grand jury returned an indictment alleging that Judge Hastings had been a participant with a Washington lawyer in a conspiracy to solicit and accept a bribe.² There was no

² The investigation and indictment are summarized in *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982), and are more fully described in the petition asking the Court to determine whether the Constitution required that impeachment by the House and trial and removal by the Senate precede prosecution by the executive and trial by the courts. See Petition for Writ of Certiorari, *Hastings v. United States*, 459 U.S. 1203 (1983) (cert. denied).

doubt of the lawyer's culpability, and he was convicted in 1982. In February 1983, however, a jury rejected what the prosecutors acknowledged was circumstantial evidence and acquitted Judge Hastings.

In March 1983, six weeks after the trial, two district judge members of the Judicial Council filed a complaint under the Act (the "1983 Complaint"). That complaint alleged that Judge Hastings was guilty of the offense of which he had been acquitted and asked that the Council so determine so that the allegations could be certified to the House. The chief judge of the circuit appointed himself and the other judges named as defendants below to serve as a special committee (the "Investigating Committee") to investigate the 1983 complaint.³ Judge Hastings

³ The acquittal, 1983 complaint, and the litigation initiated by the Investigating Committee's immediate request for the record of the grand jury that investigated Judge Hastings are summarized in *In*

promptly asked the Director of the Administrative Office of the United States Courts to confirm that funds would be provided to enable him to defend himself in proceedings under the Act. The Director denied that request. In December, Judge Hastings filed the first action seeking a declaratory judgment that the Act and the manner in which it had been implemented and applied were unconstitutional.

In July 1984, after extensive briefing and the development of a full record, the district court decided that Judge Hastings's claims were fully ripe for ad-

re Petition to Inspect and Copy Grand Jury Material (*Hastings*), 735 F.2d 1261 (11th Cir. 1984) (special panel) and are more fully described in the petition asking this court to determine whether the lower courts had properly exercised inherent authority to authorize disclosure of the entire record of a grand jury's proceedings upon the request of a special committee appointed to reinvestigate the same allegations that had occupied the grand jury. See Petition for Writ of Certiorari, *Hastings v. Investigating Committee of the Judicial Council of the Eleventh Circuit*, 469 U.S. 884 (1984) (cert. denied).

judication. It entered a summary judgment finding that the Act was facially constitutional and itself precluded the courts from exercising jurisdiction over any constitutional claims arising from its implementation and application against Judge Hastings.⁴ Judge Hastings promptly appealed. Two months later, in September, an attorney from the middle district of Florida filed a complaint (the "1984 Complaint") alleging that Judge Hastings had violated "the law prohibiting campaigning by Federal employees" in a speech he had given in a church in St. Petersburg, Florida. The chief judge reappointed the Investigating Committee to investigate the facts and allegations in that complaint.

In April 1985, the Investigating Committee notified Judge Hastings that formal

⁴ *Hastings v. Judicial Conference of the United States*, 593 F. Supp. 1371 (D.D.C. 1984), vacated and remanded, 770 F.2d 1093 (D.C. Cir. 1985), cert. denied, 106 S. Ct. 3272 (1986).

proceedings on the 1983 Complaint would commence in May and specified the procedures it would follow. Judge Hastings promptly filed a special appearance reaffirming that he would not appear or participate until his constitutional claims had been fully adjudicated. The Investigating Committee also subpoenaed one of Judge Hastings's then law clerks, four of his former law clerks, and two of the lawyers who had represented him in the criminal proceedings. Three of the law clerks and both lawyers objected to those subpoenas, giving rise to further litigation.

In mid-1985, the court of appeals below issued its decision in the first declaratory judgment action, holding that none of Judge Hastings's constitutional claims with respect to the Act's facial validity or the manner in which had been applied were ripe for adjudication. Hast-

ings v. Judicial Conference of the United States, 770 F.2d 1093 (D.C. Cir. 1985) ("*Hastings I*"), cert. denied, 106 S. Ct. 3272 (1986).⁵ Thereafter a special panel designated to sit as the court of appeals for the Eleventh Circuit undertook to determine the constitutional issues that the law clerks had standing to raise and that were ripe for adjudication in the subpoena-enforcement proceedings. That panel issued its opinion in February 1986. In *re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488 (11th Cir.) (special panel), ("*Certain Complaints*") cert. denied, 106

⁵ The on-going investigation and related proceedings are summarized in *Hastings I*. They are more fully developed in the petition asking the Court to review decision on ripeness and to determine the underlying constitutional questions presented there (and renewed here). See Petition for Writ of Certiorari, *Hastings v. Judicial Conference of the United States*, No. 85-1301, 106 S.Ct. 3272 (1986) (cert. denied).

S. Ct. 3273 (1986).⁶

In August 1986, the Investigating Committee filed its report and recommendations with the Council. Between April 1985 and August 1986, the Investigating Committee had held hearings on twenty-seven days, twenty-six in Atlanta, Georgia, and one in Darlington, South Carolina. During those hearings, it had received some 2800 exhibits and produced a 4880-page transcript. Its report and rec-

6 The investigative and related proceedings through mid-1985 are summarized in *Certain Complaints* and more fully developed in the petition asking the court to review the special panel's determinations (1) that the Act assigned exclusive jurisdiction to the court of appeals over proceedings to enforce subpoenas issued pursuant to the power the Act assigned to special committees, (2) that none of the assigned powers that the clerks had standing to challenge was unconstitutional, and (3) that the judicial privilege did not protect in-chambers conversations between judge and his law clerks from compelled to disclosure to a special committee conducting an investigation under the Act. See *Petition for Writ of Certiorari, Hastings v. Godbold*, No. 85-1609, 106 S. Ct. 3273 (1986) (*cert. denied*).

ommendations spanned 381-pages and was accompanied by a two-volume appendix. The Investigating Committee recommended that the Council determine that Judge Hastings was guilty of the offense in which he had been tried and acquitted and that he had presented false testimony and fabricated evidence at his trial.⁷ The Investigating Committee advised that its investigation into the 1984 Complaint was continuing. The Council declined to provide a copy of any of these materials to Judge Hastings. Judge Hastings refiled the action that gave rise to the proceedings in this case.

The proceedings against Judge Hastings continued to evolve while the action was in the courts below. In September, the Council made the requested determination in the proceedings initiated by the

⁷ The prosecutors had fully cross-examined Judge Hastings and had presented that claim to the jury at the original trial in February 1983. See notes 8 and 9 *infra*.

1983 Complaint and certified the matter to the Judicial Conference. On March 17, 1987, the Judicial Conference concurred in the Council's determination and transmitted the required certificate to the Speaker of the House. On March 23, two members of the House introduced a one-sentence resolution to assure that the allegations certified by the Judicial Conference would come before the House for a full vote. The House Committee on the Judiciary filed a request asking the courts to transmit the entire record of the proceedings before the 1981 grand jury for use in the legislative branch.⁸

⁸ The events that occurred through March 17, 1987, are summarized in the opinion below (A. 11-26) and developed fully in the record. Subsequent developments are matters of public record in the litigation initiated by House Committee on the Judiciary. *In re Request for Access to Grand Jury Material-Grand Jury 81-1 (Miami) (Hastings)*, 833 F.2d 1438 (11th Cir. 1987) (special panel), and *In re Grand Jury 86-3 (Miami)*, 673 F. Supp. 1569 (S.D. Fla. 1987) (mem. op.), appeal pending, No. 87-6070 (11th Cir.) (special

In the course of those evolving proceedings, it has been disclosed that the Justice Department filed a further complaint against Judge Hastings pursuant to the Act in September 1986 (the "1986 Complaint"). That complaint was based upon a telephone conversation between a criminal suspect and an attorney that the Department intercepted. According to the Department the suspect reported to the attorney that Judge Hastings, who had authorized the wire-tap, had cautioned the elected mayor of Dade County to stay away from the suspect because he was "hot." According to the new complaint, the Department used the grand jury to investi-

panel) (to be argued January 21, 1988). (See note 9 *infra* and accompanying text). These developments may properly be considered by the Court. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 114 (1976), and *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (concerning consideration of events occurring after decision in the court of appeals).

gate and determine that the mayor did claim that it was Judge Hastings who had told him to stay away from the individual, but also represented that Judge Hastings had not indicated that the suspect was under surveillance. The Department did not seek or obtain an indictment. The new chief judge of the Eleventh Circuit duly appointed a new special committee to investigate the Department's 1986 Complaint. After that investigation had started, the Department transmitted information to the House Judiciary Committee that has generated requests to the courts that the electronic surveillance material and the mayor's 1986 grand jury testimony be disclosed to the House committee for use in its impeachment inquiry.⁹

Over the past five years, Judge Hast-

⁹ The events are documented in the records in *In re Access* and *In re Grand Jury 86-3 (Miami)* and may be considered by the Court in this case. See note 8, *supra*, and authorities cited.

ings has expended personal funds and incurred liabilities in excess of one million dollars to defend himself in the proceedings initiated by the complaints under the Act and to protest the rights he and, until recently, all federal judges have held under the Constitution. The end is still not in sight. At the present time, the investigations into the 1984 and 1986 Complaints are pending and formal hearings have yet to be held on either. These are the facts that provide the context in which the Court may assess his claim that the Act is unconstitutional.

The Proceedings Below

Proceedings in the district court were completed in three weeks. The complaint was filed in the district court on August 25, 1986. That court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 (1982). Judge Hastings sought a preliminary injunction and incorporated the

record compiled in *Hastings I* as part of the record below. On September 9, the respondents filed their motion to dismiss. The Court heard argument on September 11. On the following day, it filed an order denying the motion for preliminary injunction and granting the motion to dismiss for failure to state a claim upon which relief could be granted (A. 97) accompanied by a brief memorandum opinion (A. 86-96). Judge Hastings filed his notice of appeal on September 15. The court of appeals reversed the decision insofar as it related to Judge Hastings's claims that the Act had been applied in a manner that violated his right to due process. It affirmed the dismissal of the facial challenge to the Act.

The court again declined to adjudicate Judge Hastings claim that the Act-as-a-whole was unconstitutional, this time ruling that he was precluded from relitigating

gating issues concerning the investigative powers that had been decided in the proceedings to enforce the subpoenas served on his law clerks, *Certain Complaints* (A. 26-38). The court declined to address the separation-of-powers challenge to the statutory plan because it ruled that "'fragmentary analysis' of legislation is in fact the norm in our judicial system" and that appellant had not "plausibly" established that "the peril of fragmented review" was present in this case (A. 34-35). It determined that it could consider the separation-of-powers claims only as they related to specific powers that had not been upheld in *Certain Complaints* (*id.*). The court acknowledged that the court had ruled in *Certain Complaints* that the law clerks did not have standing to raise any of Judge Hastings due-process claims addressed the to facial validity of the Act (A. 33). Nonetheless, it relied

upon the determination to fragment those claims also (A. 50-66).

For example, Judge Hastings had claimed that the combination of powers and functions in the same hands, coupled with prohibition against any judicial review of the manner in which they were exercised, violated due-process as well as separation-of-powers principles (A. 52-53). The methodology the panel employed to fragment and unbundle the claim illustrates the concerns raised by its application of avoidance doctrine throughout. The panel ruled that the issues arising from the fragment of the claim that related to the executive function of investigation were precluded (A. 51) while those that related to the legislative power to adopt substantive rules of conduct were resolved because those powers were necessary to salvage the Act from an overbreadth claim (A. 59-66). As unbundled, the panel ruled

that the remaining combination of investigative and adjudicative functions satisfied the standard for administrative agencies whose adjudications are subject to review by Article III courts that was prescribed in *Withrow v. Larkin*, 421 U.S. 35 (1975) (A. 53-56). The panel did not deem the Act's prohibition against review by Article III courts worthy of analysis, apart from the implicit view that judges entrusted with power are less likely than other mortals to abuse it. (See, e.g., A.56, 62 n.59).¹⁰

The lower court's methodology is further illustrated by its disposition of the claim that divided the panel. Judge Hastings's claim that the statutory requirement that the Judicial Conference certify

¹⁰ Cf. e.g., *The Federalist* No. 47 (Madison) 323-27 (Cooke ed. 1967) (defining "the essence of tyranny" and expressing a different view concerning the susceptibility of judges to the temptations of power).

determinations to the House of Representatives conflicted with established separation of powers principles and undermined the exclusivity of the assignment of the impeachment power.

The majority agreed that:

weighty constitutional issues would arise if certification by the Conference to the House were mandatory, because such a scheme would (1) require Article III judges to make a determination that is arguably an exercise of the judicial power yet subject to review by another branch of government or (2) force members of the Judicial Branch to make initial determinations concerning the impeachability of judges, arguably in violation of the Constitution's exclusive assignment of the impeachment power to the Legislative Branch.

(A. 40; footnotes omitted; emphasis added.) The majority viewed the certification requirement as "implicitly conditional", however. (A. 42).

The Act provides:

In any case in which the judicial council determines on the basis of a complaint and inves-

tigation under this subsection [28 U.S.C. § 372(c) . . . that a judge appointed to hold office during good behavior has engaged in conduct . . . which might constitute one or more grounds for impeachment under the Constitution; . . . the judicial council shall promptly certify such determination together with any complaint and a record of any associated proceedings to the Judicial Conference of the United States

28 U.S.C. § 372(c)(7)(B), with emphasis as added by the panel (A. 42-43). The Act also provides:

If the Judicial Conference concurs in the determination of the council, . . . it shall so certify and transmit the determination and record of proceedings to the House of Representatives.

28 U.S.C. § 372(c)(8), again with emphasis as added by the panel (A. 44). In the majority's view, "Regardless of what determination, if any, a council has made, the Conference always has the option to refrain from making any determination or from concurring in a council's determination . . ." (A. 44-45. In that view, the

use of the conditional "If" left the Conference "free of any statutory compulsion ever to confront the impeachment issue" (A. 44).

The majority also concluded that, because the Act only conferred an option to certify impeachment determinations to the House, it did not implicate the exclusivity of the constitutional assignment of the impeachment power to the House. In the majority's view, a Conference's determination should be viewed as similar to any other "private informant's suggestion that a judge may have committed an impeachable offense" (A. 46-47).

Any difference in effect on Congress that a recommendation coming from the Conference and one from a private citizen might have is without constitutional significance, however, for it is beyond doubt that the Conference, like any other individual or group, may inform the Congress when it concludes that a judge may have breached his public trust.

(A. 47).

The majority found it unnecessary, however, to consider the fact that the Conference, unlike other individuals or groups, bases its determinations upon a record compiled through the exercise of the subpoena and other powers conferred by the Act because the decision in *Certain Complaints* had determined the constitutionality of the investigatory and subpoena powers and precluded reconsideration of those issues. (A. 28-29). The panel acknowledged that "an exception [to the issue preclusion doctrine] might be made where the proponent can plausibly show what appellant here claims about the peril of fragmented review" (A. 35). It concluded that Judge Hastings "simply has not made that showing" (*id.*).

The fragment that grants the investigative and subpoena power is, however, inextricably tied to the fragment that es-

tablishes the certification procedure. As the dissenting judge suggested, " . . . we should either address the issue directly or choose a less ingenuous way to avoid reaching the constitutional issue." (A. 84-85) (Buckley, C.J., concurring in part and dissenting in part).

The court below employed similar techniques to avoid resolving the remaining claims that it acknowledge had been left open. Judge Hastings claimed, as he had from the outset and in *Hastings I*, that the Act had made judges dependent for the security of their compensation upon the discretion of their circuit chief judges and councils and had thus assigned judicial officers and agencies an unconstitutional discretion to diminish a judge's compensation in office. The panel did not construe the Act as requiring reimbursement of these expenses. Instead, it rejected the claim as premature, ruling

that Judge Hastings had failed to exhaust administrative remedies that the Act does not specify.¹¹

REASONS WHY REVIEW SHOULD BE GRANTED

1. The constitutional questions concerning the validity of the Act and the manner in which it has been implemented and applied are fundamental. Their importance is apparent, and they can only be resolved by the Court. The questions, their importance and the reasons why the Court should resolve them have been developed fully in the petitions counsel that asked the Court to review the decisions in *Certain Complaints* and *Hastings I*, and were anticipated and developed in related contents in those asking the Court to review the decisions *In re Petition to In-*

¹¹ Cf. See, e.g., *Hastings I*, 770 F.2d at 1104-11 (Edwards, J., concurring)., J. Browning, et al., *Illustrative Rules Governing Complaints of Judicial Misconduct*, 43, 45 (Fed. Jud. Center 1986) [Rule 14(h) and related commentary].

spect and Copy Grand Jury Material (Hastings), and *United States v. Hastings*.¹² Their importance was eloquently summarized in Judge Edwards's concurring opinion in *Hastings I*, 770 F.2d at 1104-11, and the anomaly resulting from their fragmentary disposition is illustrated by Judge Buckley's partial dissent below (A. 78-85). Those points will not be further developed here. There are additional points, however that bear upon the Court's decision to grant or deny review in this case. Those points could not be effectively developed before. They are developed below.

2. There are significant political reasons why any court might prefer not to take responsibility for adjudicating the facial validity of the Act. The legislative history makes it clear that the pro-

¹² See notes 2, 3, 5, and 6, *supra* (for citations).

posals for judicial conduct legislation were scrutinized by the Judicial Conference. The Conference lobbied for the Act in its present form as preferable to the bill that had been adopted by the Senate. There was, and remains, a political concern that if the judiciary will not acquiesce in legislation that assigns responsibility for policing judicial conduct to the judiciary, the House and Senate may seek a constitutional amendment or might streamline their procedures to make the impeachment process less cumbersome and more threatening to judicial independence. In one view, the judiciary's senior officials lobbied for the best political compromise possible. In that view, it would be presumptuous for any court to repudiate their efforts on the ground that the resulting legislation was unconstitutional. It might also be politically dangerous to repudiate the Act, given the current mood

of Congress and perhaps of the citizenry. Moreover, adjudication on the merits presents a "no-win" political dilemma. As the Justices must know, the Act is not popular with district judges who are its primary objects. It has significantly expanded the powers of the chiefs in an era that has already seen the independence of district judges burdened by the demands of the expanding and increasingly complex bureaucracy that has evolved within the judiciary.

These political considerations are further enhanced by the standing and present status of the judge who seeks relief in this case within the judicial community. The judge seeking adjudication in this case is not one of the deans of the federal bench; his judicial work is largely unknown outside his own district and circuit. He has been continuously under attack since shortly after his ap-

pointment. He has been indicted and prosecuted by the executive. He has been tried before his own court. He has been investigated and recommended for impeachment by the judges of his own circuit. The Judicial Conference has concurred in that determination and certified the matter to the House . In response, the House has initiated an aggressive impeachment inquiry. For seven years, Judge Hastings has challenged the establishment and the manner in which it exercised claimed powers rather than quietly departing the judicial stage. The resulting publicity has not been uniformly favorable to the courts. Surely, there must be temptations for any court to take a "pass" in this case rather than reward Judge Hastings's persistence with "the" adjudication on the merits.

Counsel for petitioner were not privy to the deliberations or thinking that led

to the decisions in the present appeal or in *Hastings I*. They had read Judge Edwards's eloquent opinion, styled a concurrence, in *Hastings I*, 770 F.2d at 1104-11, and had concluded that the judges of the court of appeals were aware of and understood the principled constitutional questions that must be resolved. They had observed that court's prompt retreat from the application of ripeness and administrative exhaustion doctrine applied in *Hastings I* in its subsequent decisions in *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987) and *Ticor Title Insurance Company v. FTC*, 814 F.2d 731 (D.C.Cir. 1987). They studied that court's opinion, but found it impossible to reconcile the manipulation of avoidance doctrine with established jurisprudence. Against that background, they have been unable to account for the decision below or prior *Hastings* decisions

without concluding that unacknowledged political considerations such as those identified above ultimately controlled the result.

The present petition is premised in significant measure upon that conclusion. It asks the Court to review the decision below and to assume responsibility for finally adjudicating the merits of the claims raised in order to eliminate a situation that has cast the lower courts in the uncomfortable role of confronting the intrabranh disputes that proceedings under the Act must generate.

3. There is further aspect of the situation that the court should consider in deciding whether review should be granted. Judge Hastings was acquitted in 1983. For almost five years, he has continued to vigorously defend his office in every forum he thought feasible. In so doing, he has absorbed the psychological

and economic burdens incident to the fight. Throughout those five years, Judge Hastings has had the option to terminate the burdens and end the fight: He could have resigned and returned to private practice and to an active public and political life. Why has he continued the fight?

It should not be apparent that Judge Hastings has not continued the fight so that he could hang on to a \$90,000-a-year job. The liabilities he has incurred are such that his compensation would not pay the interest that would accrue if his counsel billed him for their services. The costs alone have been substantial and have diminished that compensation. The prestige is nice and the work is challenging; but Judge Hastings has hardly been able to enjoy the former, and the latter can be found elsewhere in substantial measure. Why has he persisted?

There are two possibilities, and they are not mutually exclusive. Consider the possibility that he was, in the first instance and as he claimed, the innocent victim of William Borders's "rainmaking" scam and is, in the second instance and as he has alleged, the victim of the most oppressive exercise of power that embarrassed executive and judicial establishment officials were able to marshall. The record from which those possibilities might be assessed is now part of the public record. In January 1987, Judge Hastings submitted counsel's analysis of the secret evidence and proceedings to the House and released it to the public. See Anderson, *A Provisional and Preliminary Report on the Proceedings Against United States District Judge Alcee L. Hastings: 1981-1986* (Jan. 16, 1987). The House has now released the report compiled by the Investigating Committee. See Report and

Recommendations of the Investigating Committee to the Judicial Council of the Eleventh Circuit (Aug. 4, 1986) (released pursuant to House resolution on October 7, 1987). One conservative commentator has studied both and concluded that Judge Hastings is indeed the victim. See James J. Kilpatrick, "A Bum Rap for Judge Hastings", *The Washington Post*, Feb. 25, 1987, at A23 (after release of the *Provisional and Preliminary Report*) and "Hastings Getting Raw Deal," *The Tampa Tribune*, Nov. 2, 1987, at 11A (after reading *The Report and Recommendations of the Investigating Committee*).

There is a further possibility the Court should consider -- the possibility that Judge Hastings has placed constitutional duty above personal interest throughout and has acted to defend his office from what he perceives as unconstitutional encroachment. That possibility,

and perhaps only that possibility, can explain his persistence in pursuing the litigation described in the panel's opinion and reflected in the records of this court.

Counsel acknowledge that such considerations are unlikely to be articulated or acknowledged in any opinions the Court might adopt. In a purist view, those considerations should be as irrelevant to the case at hand as should the political considerations described above. This is not a purist world, however, and if factors such as these are to be considered at all, the consideration should include those on both sides of the balance.

4. The importance of the issues presented by this petition stems from two factors -- one obvious, the other less so. The obvious import stems from the nature of the case. This is an action by a federal judge seeking a declaratory judgment

to determine whether a 1980 statute adopted to regulate conduct of federal judges is, or has been applied in a manner that is, consistent with a 200-year old Constitution adopted to maintain the proper separation and limitations of federal power and to establish federal courts whose judges had sufficient independence to maintain the system. The less obvious factor stems from the manner in which the lower courts have manipulated avoidance doctrine and avoid confronting the central questions presented. In the view of petitioner and his counsel, the courts have so far departed from basic principles of jurisprudence that have long been accepted as necessary conditions to sound judicial decision making as to call for the exercise of the Court's supervisory power in the present case.

Those basic principles may be simply summarized. The fabric of the law is

never complete: The existing fabric defined by established strands of doctrine and precedent ordinarily leaves ample leeway for the exercise of judicial discretion by the judges before whom the new case comes for decision. The constraints on that discretion are of two kinds. Established doctrine and principle define limits, and departures that go beyond those limits are illegitimate unless they are acknowledged and explained. Moreover, there are known techniques that are regarded as legitimate for manipulating the strands of doctrine and precedent within the leeway available to achieve the desired result. A result that falls within the leeway permitted by precedent and principle and that has been achieved by the use of accepted techniques represents a legitimate exercise of the judicial power and discretion, no matter what the views of the losing party. The fabric of

the law may have been modified, but neither the nature of the cloth nor the integrity of the weavers will have been undermined. Decisions that do not satisfy these conditions are not legitimate decisions. Such decisions undermine the integrity of the fabric and of its weavers.

Petitioner submits that the Court should grant review in this case because the decision below and those that preceded it are inconsistent with established constraints and have undermined and will un-

dermine the integrity of the courts so long as the questions presented here remain unresolved.

Respectfully Submitted,

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